

APPEARANCES

Claimant appeared by his attorney, Mark E. Kolich of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, James B. Biggs of Topeka, Kansas.

ISSUES

- (1) Did the Administrative Law Judge err in granting claimant's motion for penalties for nonpayment of the temporary total disability ordered in the July 11, 2003 preliminary Order?
- (2) Was claimant offered accommodated work within his restrictions, which would allow for a termination of claimant's temporary total disability compensation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Board finds that the award of penalties in this matter should be modified to grant claimant penalties beginning August 21, 2003, and continuing for 15.43 weeks at the reduced rate of \$50 per week for a total of \$771.50.

Claimant was hired by respondent on March 8, 2003, as a full-time cart pusher. On his first full day of employment, March 11, 2003, claimant was injured while assisting a customer. Claimant was provided treatment by Tell B. Copenig, M.D., of the Concentra Medical Centers in Lenexa, Kansas. Dr. Copenig returned claimant to modified work, restricting claimant from pushing or pulling and from any lifting over 10 pounds. Respondent provided accommodated work within those restrictions.

However, a dispute arose between claimant and respondent as to whether the injury involved claimant's knee or his knee and his back. Respondent refused to provide treatment for claimant's back, arguing that the back injury was not the result of the March 11, 2003 injury. Claimant then sought unauthorized treatment from Todd Winters, D.C., receiving chiropractic adjustments. Dr. Winters advised claimant that working was not in his best interest, and, as a result, claimant abandoned his job with respondent.

Claimant's attorney referred him to Michael J. Poppa, D.O., board certified in occupational medicine, for an examination on May 9, 2003. Dr. Poppa recommended claimant return to work with restrictions of no lifting, pushing or pulling greater than

10 pounds and further suggested claimant alternate sitting and standing, with change of positions as necessary.

The parties proceeded to preliminary hearing on June 30, 2003, in front of Administrative Law Judge Julie A.N. Sample. At that time, claimant requested medical treatment and temporary total disability compensation. The Judge agreed with claimant, ordering temporary total disability compensation to continue from April 16, 2003, until claimant is released to substantial gainful employment.

As a result of the June 30, 2003 preliminary hearing, claimant was referred for medical treatment with Dr. Bernhardt. However, it was discovered that Dr. Bernhardt's first available examination was not until late November. Therefore, the parties agreed that claimant would be referred to Stephen L. Reintjes, M.D., for an earlier appointment. Claimant was examined by Dr. Reintjes on September 15, 2003, at which time Dr. Reintjes recommended an MRI scan of the lumbar spine. In his December 12, 2003 letter to respondent's attorney, Dr. Reintjes stated that "I typically would suspend people from working while undergoing a diagnostic study until I could define the problem."

The MRI displayed a large left-sided L5-S1 disc herniation. Dr. Reintjes recommended surgery and also provided restrictions of no lifting over 35 pounds, with limited bending and twisting. Dr. Reintjes further restricted claimant from sitting, standing or walking more than two hours at a time and more than ten hours per day. Dr. Reintjes went on to state that those restrictions would be appropriate from March 11, 2003, until the present day, assuming that the L5-S1 disc herniation was present since the accident.

On July 27, 2003, respondent's representative, Dan Trullinger, provided a letter to claimant's attorney, which contained a "bona fide job offer," returning claimant to work within the restrictions of Dr. Copenig.² Additionally, as of August 21, 2003, respondent stopped temporary total disability compensation payments, contrary to the July 11, 2003 Order of Judge Sample. Respondent argues that the termination of temporary total disability payments was appropriate, as the job offer from respondent fell within the restrictions of the then treating physician. Claimant, however, argues that respondent violated the July 11, 2003 Order of Judge Sample and was not justified in terminating the benefits. Administrative Law Judge Hursh, in his December 16, 2003, Order, stated:

The intent of the preliminary order was for the respondent to provide an authorized doctor, and pay temporary total until that doctor released the claimant to return to work, either without restrictions or with restrictions the respondent could accommodate. The preliminary order did not intend for the respondent to pay temporary total benefits until the respondent came up with an accommodated job

² M.H. Trans., Cl. Ex. 3.

based on prior restrictions before the respondent ever provided an authorized doctor. Nevertheless, the respondent's authorized doctor has issued temporary restrictions that would preclude the claimant from doing the offered accommodated job. For these reasons, the claimant has remained temporarily totally disabled since August 20, 2003 and continuing until he is released from treatment, taken off work restrictions, or given work restrictions that will permit substantial gainful employment.

The Administrative Law Judge went on to order \$100 per week civil penalties beginning August 29, 2003, and running through the date of the hearing on claimant's motion for penalties. The Administrative Law Judge calculated 14.29 weeks had elapsed during that period. Claimant argues that the penalty period should have begun August 21, 2003, the date temporary total disability compensation benefits were stopped. The Board agrees with claimant. Judge Hursh's Order is, therefore, modified to award penalties beginning August 21, 2003.

K.S.A. 44-534a authorizes an administrative law judge to order payments of temporary total disability compensation from a preliminary hearing. In this instance, that was accomplished. The Order granted temporary benefits until claimant was released to any substantial gainful employment. Respondent then arbitrarily determined that its job offer fell within the restrictions placed upon claimant by Dr. Copening, even though those restrictions were generated in March 2003 and the benefits were terminated over five months later. Additionally, it is significant that the medical records of Dr. Copening and the medical report of Dr. Poppa were available to Judge Sample at the time she issued the Order for temporary total benefits. Therefore, respondent's decision to terminate temporary total disability compensation benefits, based upon a job offer using Dr. Copening's medical reports, was a direct violation of the Judge Sample's Order for temporary total disability compensation, with no justifiable medical opinions to counteract those already reviewed by the Administrative Law Judge. Additionally, Dr. Reintjes, the neurosurgeon who examined claimant in September 2003, limited claimant's sitting and standing, as did Dr. Poppa in May of 2003.

The Board finds that respondent's arbitrary termination of temporary total disability compensation was without justification and that penalties, pursuant to K.S.A. 44-512a, are appropriate. The Board, however, does acknowledge that, under K.S.A. 44-512a, penalties are authorized for not more than \$100 per week for each week disability is past due. In this instance, the actions of respondent, while contrary to the preliminary hearing Order, were apparently done in good faith, with the belief that the termination of benefits was justified. The Board, therefore, reduces the penalties to \$50 per week for 15.43 weeks totaling \$771.50. The Board recommends that, in the future, any alterations to a preliminary hearing order either be by agreement of the parties or be accomplished through the advice and consent of the administrative law judge, rather than by arbitrary determination by a respondent and/or its insurance carrier.

The parties acknowledged at oral argument that the temporary total disability compensation payments were current or within one or two days of being current, and the attorneys were in the process of resolving that discrepancy.

However, an additional issue was raised during the oral argument before the Board. It was discussed by the attorneys that respondent may have paid the penalties awarded prior to the oral argument before the Board.

A party who voluntarily complies with a judgment cannot thereafter adopt an inconsistent position and appeal the judgment.”³

The Board has held in past orders that payment of attorney fees is acquiescence to an order and respondent cannot, thereafter, adopt an inconsistent position and request a review of that order.⁴ Additionally, the Board has held that payment of penalties is acquiescence to an order and respondent and its insurance carrier may not, thereafter, adopt an inconsistent opinion and request a review of that order.⁵ However, by a letter dated May 12, 2004, the Board was advised by the attorney for respondent that the penalties had not been paid. Therefore, the dispute regarding respondent's possible acquiescence does not need to be determined.

The Board modifies the Order of Administrative Law Judge Kenneth J. Hursh, granting penalties in the amount of \$771.50 to be paid to claimant and his attorney. Respondent is entitled to credit for any amounts previously paid.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated December 16, 2003, should be, and is hereby, modified and penalties are awarded to claimant from respondent and its insurance carrier beginning August 21, 2003, for 15.43 weeks at the rate of \$50 per week in the amount of \$771.50 pursuant to K.S.A. 44-512a.

³ *Labette Community College v. Board of Crawford County Comm'rs*, 258 Kan. 622, 907 P.2d 127, Syl. ¶ 2 (1995).

⁴ *Smeeks v. Wal-Mart*, No. 258,382, 2002 WL 985416 (Kan. WCAB Apr. 24, 2002).

⁵ *Clark v. Food Barn*, No. 166,431, 1995 WL 781172 (Kan. WCAB Dec. 21, 1995).

IT IS SO ORDERED.

Dated this ____ day of May 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
James B. Biggs, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director